No. 11171.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KENTON GEORGE SCHULTZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdiction.

Appellant was indicted under Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 311) [R. 2-4].[1] The District Court had jurisdiction under Section 24 of the Judicial Code (28 U. S. C. 41(2)). Judgment was entered on October 23, 1945 [R. 9-10]. Notice of appeal was filed on October 25, 1945 [R. 10-11]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

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[1]The references preceded by "R" are to the printed record on appeal.

Statute and Regulation Involved.

Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. 311), provides in part:

> "Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act, * * * shall, upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by both such fine and imprisonment. * * *"

Section 641.3 of the Selective Service Rules and Regulations promulgated under the Act provides in part:

> "It shall be the duty of every registrant to keep his local board advised at all times of the address where mail will reach him. * * *"

Statement of the Case.

Appellant was indicted in the United States District Court for the Southern District of California, Northern Division, on about July 11, 1945, in two counts, charging violations of the Selective Training and Service Act of 1940 (*supra*) [R. 2-4], herein called the Act, in that he (a) had failed to report for induction into the Armed Forces as ordered by his draft board [R. 2-3], and (b) had failed to keep his local draft board advised of his address [R. 3-4], thereby knowingly failing to perform duties required of him by the Act and rules and regulations promulgated under it.

Count 1 of the indictment was dismissed prior to trial [R. 5].[2]

Appellant was then tried before the District Court judge and a jury upon Count 2 of the indictment, and was found guilty by the jury as to that count [R. 9].[3]

Following denial of appellant's motion in arrest of judgment, on October 23, 1945, the District Court sentenced appellant to imprisonment for a term of 18 months [R. 4-5, 8-10].

Appellant filed a notice of appeal and grounds of appeal on October 26, 1945 [R. 10-11], and an assignment of errors on January 11, 1946 [R. 12].

Questions Presented.

The sole issues before this Court are (1) whether it is a violation of the Act for a registrant to knowingly fail to keep his local draft board advised at all times of the address where mail will reach him, and (2) whether Count 2 of the indictment sufficiently states such an offense under the Act.

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[2]Appellant objected to the dismissal of Count 1, and also entered an exception [R. 5.]

[3]The record on appeal does not indicate what plea was entered by appellant to the indictment. The record is also incomplete in other respects.

ARGUMENT.

Appellant argues in effect (a) that under the Act a registrant has committed no violation by failing to keep his local draft board advised at all times of the address where mail will reach him (A. B. 3-5),[4] and (b) that Count 2 of the indictment does not state such an offense under that Act (A. B. 6-14).

Both contentions are patently without merit.

A.

Little need be said in answer to the appellant's contention (A. B. 3-5) that his failure to keep his local draft board advised at all times of his address, is not a crime.

The statute expressly makes it a crime for any person in any manner to "knowingly fail or neglect to perform any duty required of him under or in execution of this Act or rules or regulations made pursuant to this Act * * *."

Regulation 641.3 specifically provides that:

> "It shall be the duty of every registrant to keep his local board advised at all times of the address where mail will reach him."

The Supreme Court and other courts have indicated that failure to comply with this specific provision is a crime under the Act. See *e. g., Bartchy v. United States,* 319 U. S. 484, reversing the decision below on other

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[4]The references preceded by "A. B." are to the appellant's brief.

grounds (see *infra,* p. 8); *Bartchy v. United States,* 132 F. (2d) 348 (C. C. A. 5); *United States v. Trypuc,* 136 F. (2d) 900, 901 (C. C. A. 2); *United States v. Hoffman,* 137 F. (2d) 416, 419 (C. C. A. 2).[5]

Appellant's contentions in this respect are clearly without substance.

B.

Appellant asserts (A. B. 6-14) that Count 2 of the indictment does not sufficiently charge the offense of which he was convicted. Appellant's entire argument in this respect is predicated upon his assertions that it is not sufficient to allege in an indictment under the Act that the defendant "knowingly" failed to perform the duty required of him under that statute. According to appellant, the indictment should have alleged in addition that he had acted or failed to act "unlawfully," "wilfully," and "feloniously."

This contention is patently baseless.

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[5]It should be noted at this point that almost all of appellant's argument in this connection, beginning in the middle of page 3 and continuing thereafter to line 8 from the bottom on page 5, of his brief, has been lifted practically verbatim from Judge Hutcheson's dissenting opinion in *Bartchy v. United States,* 132 F. (2d) 348, 349 (C. C. A. 5), which we discuss more fully below (p. 8, *infra*). Although the majority decision was later reversed by the Supreme Court because of the lack of substantial evidence to support the verdict, the majority's holding that it is a violation of the Selective Training and Service Act of 1940 for a registrant to fail to keep his draft board advised of his address, was nonetheless upheld.

Manifestly it is wholly improper for appellant to seek to foist upon this Court a dissenting opinion rejected in that respect by the Supreme Court.

It is established law, requiring no citation of authorities, that a statutory offense may be charged in an indictment in the language of the statute.[6]

As this Court in part pointed out in *Zuziak v. United States,* 119 F. (2d) 140, 141 (C. C. A. 9), which involved a criminal prosecution under Section 11 of the Selective Training and Service Act of 1940, the same as in this case:

> "Section 11, 50 U. S. C. A. § 311, 'provides that any person who *knowingly* evades registration or fails or neglects to perform any duty devolving upon him under the Act or the regulations, shall, upon conviction of such offense, be subject to fine or imprisonment, or both." (Italics ours.)

In *Moore v. United States,* 128 F. (2d) 974 (C. C. A. 5), the defendant was indicted and convicted for "knowingly hindering and interfering by force and violence with the administration of the Selective Training and Service Act of 1940" (p. 975), the same statute as in the instant case except that the prosecution was under a different section; that section, however, also makes it a crime for an individual to act "knowingly" in the proscribed manner (see 50 U. S. C. App. 311). In overruling the arguments of the appellant Moore, the Court in that case stated, with specific reference to Moore's contention that his demurrer to the indictment should be sustained.

> "The function of an indictment is to apprise a defendant fully and clearly of the nature and extent of

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[6]See, *e. g., Ledbetter v. United States,* 170 U. S. 606; *Taran v. United States,* 88 F. (2d) 54, 56 (C. C. A. 8).

the charges made against him, so that he will be enabled to make his defense, and, after judgment, plead the judgment in bar of further prosecution for the same offense. This indictment followed the language of the statute painstakingly, and particularized with exactness the acts relied upon to sustain the charge. It is difficult to conceive how the indictment could more lucidly have advised the defendant of the precise crime charged, or in what way it might have been misleading, and we thing the demurrer to the indictment was properly overruled."

See also *United States v. Collura,* 139 F. (2d) 345 (C. C. A. 2), also a case under this Act.

In *Bartchy v. United States,* 132 F. (2d) 348, the majority opinion in part held that:

"Appellant, a registrant under the Selective Training and Service Act of 1940, U. S. C. A. Appendix, § 301, *et seq.,* was found guilty of knowingly failing to keep his local draft board advised at all times of the address where mail would reach him, in violation of Section 11 of the Act. The only decisive question is whether there was substantial evidence to support the finding of the court below, the case having been tried without a jury.

"Article 641.3 of the selective service regulations, promulgated under Section 10 of the Selective Training and Service Act of 1940, places an affirmative duty upon every registrant under the Act to keep his local draft board advised at all times of the address where mail will reach him. The finding of the court below that appellant failed in the discharge of his duty is supported by substantial evidence."

Judge Hutcheson in a dissenting opinion relied upon heavily by appellant (A. B. 3-5), in effect held that the activities of the defendant, even if accepted as found by the District Court, would not constitute a violation of the Act within the meaning of the section in question, and further held that the evidence was not sufficient to support a finding of guilty, even if the acts would constitute such a violation.

The Supreme Court, however, in reversing (319 U. S. 484) the majority opinion of the Circuit Court in the *Bartchy* case, did so wholly upon the basis of insufficiency of the evidence. In doing so, morever, the Supreme Court clearly indicated that under that statute a registrant is guilty of an offense if it is merely shown that he "knowingly" failed or neglected to keep his local board advised at all times of the address where his mail will reach him.

It is obvious, therefore, that Judge Hutcheson's dissenting opinion can in nowise aid this Court in its determination in this case, and that appellant's heavy reliance upon that opinion merely tends to accent the utter lack of any judicial or rational support for his contentions along the lines which he offered here.[7]

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[7]It should be noted at this point that the appellant in this case has made no issue of the sufficiency of the evidence, upon which he was found guilty by a *jury*. The appellant is, therefore, in no position now to raise any question which is bottomed in any respect upon the evidence or the facts in this case. In the present posture of this case and the record on appeal, it must be conclusively presumed by this Court that the evidence in this case fully supports the strongest possible case from the Government's standpoint, and that the appellant committed the most flagrant violation possible under the Act which could be established under the indictment in this case. As a result, no proposition of law which is to be tested by the sufficiency or the totality of the evidence can be applied to this case in favor of appellant.

Moreover, Judge Hutcheson, after the Supreme Court decided this case, changed his mind upon the question of a registrant's guilt under the Act where he fails to keep his local board advised of his address. *Stumpf v. Sanford,* 145 F. (2d) 270 (C. C. A. 5), cert. denied, 65 S. Ct. 1012.[8]

The opinion of the Second Circuit in *United States v. Trypuc,* 136 F. (2d) 900, mentioned by appellant (A. B. 13), is likewise of no aid to him. In that case the Court, in reversing the judgment of conviction below, held that the issue of whether the appellant "knowingly" failed to keep his local board advised of his address, had not been properly submitted to the jury. We concede that if the District Court in this case had failed to submit such an issue to the jury, a serious question would be presented on appeal. However, there is nothing in this case to indicate that this issue had not been properly submitted below. And while appellant seeks to strain the holding in the *Trypuc* case to support his contention that the indictment must contain other terms besides "knowingly," examination of that decision reveals that appellant's argu-

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[8]Judge Hutcheson in that case states:

> "The contentions, overruled by the District Judge and urged here, are that it is no offense against the law to fail to notify the local board of a change of address.
>
> "That a registrant's *wilfully* failing to keep his local board advised of a change of address is a crime, we held in *Bartchy v. U. S.*, 5 Cir., 132 F. (2d) 348, reversed for lack of sufficient evidence, 319 U. S. 484, 63 Sup. Ct. 1206, 87 L. Ed. 1534."

It is obvious that Judge Hutcheson's use of the word "wilfully" in this case is an inadvertance; he plainly meant "knowingly."

ment in this connection again is without substance. As the Court says in that case (at page 901):

> "* * * But an examination of the charge convinces us that *the issue whether the appellant 'knowingly' failed to keep the board advised of an address where mail would reach him* was not properly submitted to the jury. * * * Not every failure to perform a duty imposed by the statute or regulations is made criminal; *only a person 'who shall knowingly fail or neglect' his duty is to be punished.*" (Italics ours.)

See also, *United States v. Hoffman,* 137 F. (2d) 416, 419 (C. C. A. 2), to the same general effect.

Manifestly, under the Selective Training and Service Act of 1940 an offense is properly stated when the indictment charges that a defendant "knowingly" failed or neglected to perform an act required of him; the terms "wilfully," "feloniously" or "unlawfully" are wholly unnecessary and are properly omitted from such an indictment. And support for the latter proposition is found in the authorities which appellant himself cited and quoted in his "authorities in support of motion" in arrest of judgment [R. 6], filed by him below. Thus, quoting from appellant's "authorities":

> "The general rule is that the term 'wilfully' cannot be omitted from an indictment *when the term is part of a statutory definition.*" (Italics ours.)
>
> Wharton's Criminal Procedure (10th Ed.), Vol. 1, §§ 285 and 318;
>
> *Rumley v. United States,* 293 Fed. 532 at p. 547 [7].
>
> "* * * The indictments charged in part that these defendants well knowing the premises aforesaid,

unlawfully did 'knowingly' act. This amounts to an allegation of unlawful intent."

United States v. Altman, 8 Fed. Supp. 880 at 884.

"* * * and it is also generally held that words which import an exercise of the will, such as 'feloniously' and 'unlawfully' will, supply the place of the word 'wilfully.'"

"* * * Where the facts alleged necessarily import wilfulness, the failure to use the word is not fatal to the indictment."

Van Gesner v. United States, 153 Fed. 46.

Of course, it need hardly be mentioned, that the mere fact that some indictments contain a complete collection of the terms which appellant argues are essential in every case, is no test of their essentiality. The question is merely what is actually required in an indictment, not how much can be included. See, *e. g.,* also *Bannon v. United States,* 156 U. S. 464; *Myres v. United States,* 256 Fed. 779 (C. C. A. 5); *Bowen v. Johnson,* 97 F. (2d) 860 (C. C. A. 9), aff'd., 306 U. S. 17; *Howenstine v. United States,* 263 Fed. 1 (C. C. A. 9); *Rumley v. United States,* 293 Fed. 532 (C. C. A. 2), cert. den. 363 U. S. 713.

Here, as in the *Zuziak* case, *supra;*

"It is obvious that the indictment fully informed the accused of the nature of the charge so as to enable him to prepare any defense he might have. That is the office of an indictment and nothing more specific in the matter of form is required of it. 18 U. S. C. A. § 556. The indictment states an offense under the statute."

Conclusion.

The acts charged in the indictment constitute an offense under the Act. The indictment sufficiently charges such an offense. Appellant was found guilty by a jury, and no reason appears for disturbing the jury's verdict or the judgment below. The judgment should be affirmed.

Respectfully submitted,

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